

**8065 PRESCRIPTIVE RIGHTS BY USER: DOMESTIC CORPORATION,  
COOPERATIVE ASSOCIATION, OR COOPERATIVE (WIS. STAT. §  
893.28(2))**

(Prescriptive easement user) claims that it is entitled to a nonexclusive use of (title holder)'s real estate for the purpose of (describe use, e.g., transmitting power or electric current). This is called a prescriptive easement. To establish a claim for a prescriptive easement, (prescriptive easement user) must prove the continuous use of (describe use, e.g., transmitting power or electric current) in real estate of another<sup>1</sup>; which was visible, open, and notorious; for ten years<sup>2</sup>.

[A continuous use is one that is neither voluntarily abandoned by the party claiming a prescriptive right nor interrupted by an act of the landowner or a third party.]<sup>3</sup>

[A visible, open, and notorious use is one that would put a reasonably diligent landowner on notice of the use.]<sup>4</sup>

**[Note: The following paragraph should be given where the use claimed to be continuous is seasonal in nature:** Where the use is seasonal in character, the requirement of continuity is satisfied by the use of the real estate according to the existing seasonal uses, needs, requirements, and limitations, taking into consideration the location and the adaptability of the real estate for the seasonal use.]

(Title holder) is presumed to be in possession of the real property claimed by (prescriptive easement user). Therefore, the burden is on (prescriptive easement user) to establish its claim. Finally, (prescriptive easement user) has the burden of proof to clearly

define the area of land over which it has continuously asserted use of rights for ten years. While absolute precision or utilization of a surveyor is not required to establish lines of occupancy, the evidence must provide a reasonably accurate basis upon which to determine the boundary of the proscriptive easement.

[Burden of Proof, Wis JI-Civil 200]

#### NOTES

1. As sub. (1) is written, it is more natural to read “of another” to modify “real estate,” rather than “rights.” That is, by continuous use, one may gain a prescriptive right in another’s real estate. The real estate in which a right is gained must belong to another person. Hall v. Liebovich Living Trust, 2007 WI App 112, 300 Wis. 2d 725, 731 N.W.2d 649, 06-0040.

2. Except as provided by Wis. Stat. § 893.29.

3. See Red Star Yeast & Prods. Co. v. Merch. Corp., 4 Wis. 2d 327, 335, 90 N.W.2d 777 (1958); see also 25 Am. Jur. 2d Easements and Licenses § 51.

4. See Kurz v. Miller, 89 Wis. 426, 433-34, 62 N.W. 182 (1895).

#### COMMENTS

This instruction and comment were approved by the Committee in October 2022.

**Common law elements.** At common law, a party acquired a prescriptive right in another’s real property upon: (1) an adverse use hostile and inconsistent with the exercise of the titleholder’s rights; (2) which was visible, open, and notorious; (3) under an open claim of right; and (4) was continuous and uninterrupted for 20 years. Ludke v. Egan, 87 Wis. 2d 221, 230, 274 N.W.2d 641 (1979).

**Statutory elements.** With respect to public utilities, the legislature replaced the common law with Wis. Stat. § 893.28(2). See § 28, ch. 323, Laws of 1979. Under § 893.28(2), a public utility “establishes the prescriptive right to continue [its] use” of rights in another’s real property upon “[c]ontinuous use of [those] rights ... for at least 10 years.” Additionally, § 893.28(2) eliminated the elements of adversity and claim of right as requirements for public utilities’ establishment of prescriptive rights. See Bauer v. Wisconsin Energy Corporation, 2022 WI 11, ¶20, 400 Wis. 2d 592, 970 N.W.2d 243, 250. The abrogation of these two elements was meant to allow a permissive use to ripen into a prescriptive right. See Williams v. Am.

Transmission Co., LLC, 2007 WI App 246, ¶¶9-15, 306 Wis. 2d 181, 742 N.W.2d 882. § 893.28 also reduced the vesting period from 20 to 10 years.

**Visible, open, and notorious element.** § 893.28(2) contains no mention of the use being either “visible, open, and notorious.”

**Permissive use ripening into a prescriptive right.** Unlike common law claims-of-right, that require an adverse use of rights in another’s real property, Wis. Stat. § 893.28(2) “omits any mention of the use being ‘adverse’ or ‘hostile and inconsistent with the exercise of the titleholder’s rights.’” Bauer v. Wisconsin Energy Corporation, 2022 WI 11, ¶19, 400 Wis. 2d 592, 970 N.W.2d 243, 250. As the Court noted in Bauer, context makes clear that “the legislature drafted § 893.28(2) to allow a permissive use to ripen into a prescriptive right. See also, Williams v. American Transmission Co. LLC, 306 Wis.2d 181, ¶¶9-15, 742 N.W.2d 882. Therefore, the statute’s omission of the adversary requirement allows permissive uses, such as licenses, to ripen into prescriptive rights. Id. The court did not decide whether the ‘visible, open, and notorious’ requirement that is generally a part of an adverse possession case applies to a claim brought under Wis. Stat. sec. 893.28(2), but did note that, “[s]uch a use is not inherently inconsistent with a permissive license.” Bauer, supra, at ¶22.